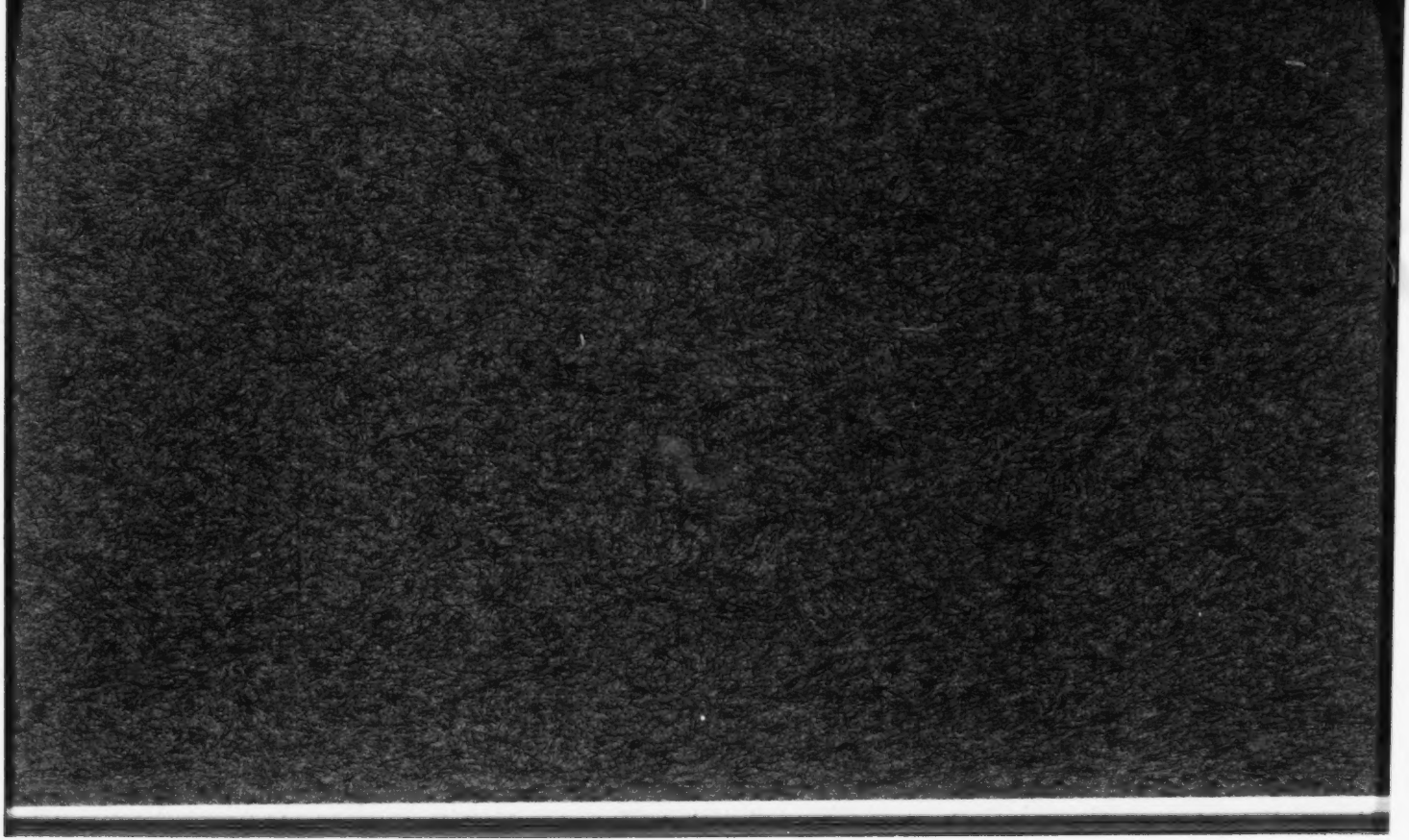

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 640

GREAT LAKES DREDGE & DOCK COMPANY, OWNER OF THE STEAM TUG "JOHN R. WILLIAMS," PETITIONER

v.

UNITED STATES OF AMERICA, OWNER OF SUBMARINE CABLE NO. 555

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the District Court of the United States for the Southern District of New York (R. 138–140) are reported in 1941 A. M. C. 1588. The opinion of the district court (R. 154–156) overruling exceptions (R. 152–154) to a commissioner's report on damages (R. 143–151) is reported in 50 F. Supp. 409. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 168–174) is reported in 144 F. (2d) 451.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on August 12, 1944 (R. 174–175). The petition for a writ of certiorari was filed on October 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In a suit in admiralty for damages to a submarine cable, alleged to have been caused by the fault of petitioner and its tug, the district court entered a decree *in rem* against the tug and *in personam* against petitioner. The court below, on appeal, held that the suit did not fall within admiralty jurisdiction and vacated the decree *in rem*, but affirmed the decree *in personam* as within the jurisdiction of the district court at law. The questions presented are:

1. Whether such action of the court below denied petitioner a right to trial by jury, it appearing that although petitioner challenged the admiralty jurisdiction in the district court, it at no time requested a trial by jury.

2. Whether both courts below erred in holding that petitioner was at fault and in assessing the damages for the repair of the cable.

STATEMENT

The United States, respondent herein, owned a submarine telephone cable designated as Cable

No. 555 lying across the Narrows at the entrance to New York Harbor and connecting Fort Wadsworth and Fort Hamilton (R. 3–4, 27–28). On the morning of August 22, 1938, the petitioner's Tug *John R. Williams* was proceeding out through the Narrows to the dumping grounds with a loaded dump scow in tow on a single steel hawser and bridle (R. 4, 7–8, 12, 17, 48–49). The tug had out about 800 feet of hawser (R. 12, 17, 50, 61–62, 129). In the Narrows, at a point 80 feet deep (R. 40), within an area marked "cable area" on U. S. Coast & Geodetic Survey Chart 369, it was necessary for the tug to slow down so that a patrol boat operated by the War Department might come alongside and pick up a required permit (R. 4, 8–9, 12, 17, 36–38, 50–51, 129). At that time the tide was ebbing, so that when the tug slowed down the hawser between it and the dump scow slackened and dropped under water (R. 9, 37, 50) and the scow moved at least 300 feet closer to the tug (R. 29–31, 37, 50, 62). After surrendering her permit, the tug started forward at one-half speed (R. 9, 37, 51, 129) but immediately listed heavily to port (R. 9, 51, 129). This indicated to her master that her towing hawser was caught on something (R. 9, 51, 60, 129). He slowed down his engines to about one-third speed (R. 51, 60–61, 129) and attempted to heave the hawser clear by means of the tug's steam towing reel (R. 51). When this proved unavailing (R. 51), the hawser's outer

end was freed by cutting the bridle on the bow of the scow (R. 9, 51–52, 129). The tug was then able to reel in its hawser and did so (R. 52, 56–57, 129). About 150 feet of the hawser was cut and "badly shaved" (R. 9, 52, 129).

An alarm system, under constant surveillance, was maintained at Fort Hamilton to give warning in the event the cable connecting that fort with Fort Wadsworth should be damaged (R. 28). At 10:39 a. m., August 22, 1938, the alarm signalled that the cable was out of order (R. 123). This was immediately reported to the officer in charge (R. 27–28, 34–35, 123–124) who looked out over the cable area and saw the Tug *John R. Williams* and her scow (R. 29–31, 36–38). There were no other ships in the cable area at the time (R. 30). Subsequent inspection of Cable No. 555 indicated that it had been broken in two and that it looked "as if it had been subjected to quite a strain just before parting" (R. 103).

On April 9, 1940 (R. 1), respondent filed a libel in admiralty (R. 3–6) against petitioner and its Tug *John R. Williams* charging them with fault and negligence resulting in the fouling of Cable No. 555 (R. 3–5) and seeking damages in the amount of $4,000 (R. 5). Petitioner filed an answer (R. 7–10) challenging the alleged admiralty jurisdiction (R. 8; Pet. 8, 11), admitting the essential facts asserted by respondent (R. 7–9), but denying that the tug's hawser caused any

damage to Cable No. 555 (R. 9) or that there was any fault or negligence in the navigation of the tug at the time in question (R. 10). The petitioner did not request, in the answer or otherwise, a trial by jury.

The district court, after trial (R. 26–66), ruled that there was admiralty jurisdiction (R. 140), made findings of fact (R. 138–140) and entered an interlocutory decree for respondent (R. 141). The district court (R. 139–140) found the facts substantially as set forth *supra* and concluded that petitioner had severed respondent's cable; that the tug captain, "on notice that he was in a cable area," was negligent in "running his boat for fifteen minutes at one-third speed and raising his hawser with the towing machine within the cable area" "when he recognized his hawser was fouled;" that this negligence was the proximate cause of the injury to the respondent's cable; and that the court had jurisdiction of the proceeding (R. 140). The court referred the matter to a commissioner to determine the amount of damages due to respondent (R. 141).

After a hearing (R. 67–95), the commissioner filed his report (R. 143–151) allowing respondent $1,918.67 as damages, consisting of the cost of cable material used to make repairs and the cost of maintenance of the respondent's cable ship and its men while engaged in repair work. The district court entered a final decree in favor of respondent for this amount against petitioner *in*

personam and against the tug *in rem* (R. 154–160).

On appeal, the Circuit Court of Appeals held that this suit was "not maintainable in admiralty," in that Cable No. 555 was not an aid to navigation in the maritime sense. It accordingly vacated the decree of the district court against the tug and dismissed the libel against the tug (R. 174–175). However, the court also held that the suit "is good at law" (R. 174), and therefore affirmed the decree *in personam* against petitioner (R. 174–175).

ARGUMENT

Respondent has not sought review of the ruling below that this suit was "not maintainable in admiralty" (R. 174). That decision finds support in numerous decisions. *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 388; *Cleveland Terminal and Valley R. R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *The Troy*, 208 U. S. 321; *The Poughkeepsie*, 162 Fed. 494 (S. D. N. Y.), affirmed *per curiam*, 212 U. S. 558; *Portland General Electric Co.* v. *United States*, 142 F. (2d) 552 (C. C. A. 9), certiorari denied October 23, 1944; cf. *United States* v. *Byers*, 144 F. (2d) 455 (C. C. A. 2).

We submit that the questions presented by the petition for certiorari do not warrant further review since their determination below was clearly correct.

1. It is not denied that the cause of action for damage to the cable was one which the district court had jurisdiction to entertain at law (28 U. S. C. § 41 (1)). Consequently, after vacating the decree *in rem* against the tug for want of admiralty jurisdiction, the court below was clearly correct in affirming the district court's decree *in personam* as to petitioner. For when "every fact appears, necessary to the jurisdiction of the court on the law side," "when a cause of action is within the substantive jurisdiction of the District Court for any reason, it does not mar that jurisdiction that the suitor proceeds as libellant in the admiralty rather than as plantiff at law." *Prince Line* v. *American Paper Exports, Inc.*, 55 F. (2d) 1053, 1056 (C. C. A. 2); *United States ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, 250 Fed. 939 (C. C. A. 2), certiorari denied, 248 U. S. 564; *Owens* v. *Breitung*, 270 Fed. 190 (C. C. A. 2); *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. (2d) 226, 229 (C. C. A. 2); cf. *The Sarah*, 8 Wheat. 391; *Cory Bros. & Co.* v. *United States*, 51 F. (2d) 1010, 1013 (C. C. A. 2); *Louis-Dreyfus* v. *Paterson Steamships, Ltd.*, 43 F. (2d) 824, 828 (C. C. A. 2).[1] To require dismissal of the entire suit and institu-

[1] The cases cited by the petitioner (Pet. 8) as in conflict with the decision below do not support its argument. In *The Sarah*, 8 Wheat. 391, this Court, finding that the subject matter of the suit was not within the admiralty jurisdiction, did not direct a dismissal but, rather, remanded the proceeding to the district court so as to permit the libel to be amended to allege facts stating a cause of action at law. Such a re-

tion of another with identical allegations would be just "such compartmentalizing of litigation * * * and waste in time and expense of litigants, [as] is no longer tolerated as between jurisdiction in equity and law, and should not be encouraged as between admiralty and law." *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. (2d) 226, 229 (C. C. A. 2); cf. Clark, *The Union of Law and Equity*, 25 Col. L. Rev. 1, 9,

2. Petitioner contends (Pet. 12) that by being sued in admiralty and then having the final decree treated as one at law, he was deprived of the right of trial by jury. But, as the court below found, petitioner "laid no foundation for availing itself of that right by demanding such a trial in accordance with Rule 38" of the Federal Rules of Civil Procedure (R. 174). While petitioner raised the issue of lack of admiralty and maritime jurisdiction in the district court (R. 8, 171; Pet. 8, 11) as well as in the Circuit Court of Appeals (R. 162), at no time did it request a trial of the issues to

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mand in the instant proceeding would be a vain act since the present libel states facts which do constitute a cause of action at law. In *Westfall Larson & Co.* v. *Allman-Hubble Tug Boat Co.*, 73 F. (2d) 200 (C. C. A. 9), and *Home Ins. Co.* v. *Merchants' Transp. Co.*, 16 F. (2d) 372 (C. C. A. 9), the court upheld the decision of a district court which had sustained exceptions to a libel in admiralty for want of jurisdiction. In neither these cases nor the other decision of the C. C. A. 9th, cited by petitioner (Pet. 8), did it appear affirmatively, as in the instant proceeding, that the requirements were present necessary to give the district court jurisdiction at law. None of the other decisions alleged to present a conflict (Pet. 8) is in point.

a jury. "The formal denial of the jurisdiction of the admiralty side was not enough to preserve the right." *Prince Line* v. *American Paper Exports, Inc.*, 55 F. (2d) 1053, 1057 (C. C. A. 2). Not having claimed a jury trial either when it first denied the admiralty jurisdiction or at any seasonable time thereafter, petitioner must be held to have waived trial by jury. Rules 38 (b) and (d) and 6 (b), F. R. C. P.; *Prince Line* v. *American Paper Exports, Inc., supra; The Barbara Cates*, 17 F. Supp. 241, 244 (E. D. Pa.); cf. *United States ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, 250 Fed. 939 (C. C. A. 2), certiorari denied, 248 U. S. 564. See *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. (2d) 226, 230 (C. C. A. 2).[2]

3. Petitioner challenges the decision below that it was liable not only for the cost of the materials necessary to repair the Government's cable, but

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[2] *Crouch* v. *United States*, 8 F. (2d) 435 (C. C. A. 4), cited by the petitioner (Pet. 9) as in conflict with the decision below, does not support its argument. There the court remanded a war risk insurance case against the United States "for a trial according to law," since it appeared that the trial judge as well as counsel for both parties had proceeded with the trial of the case without a jury under the mistaken belief that the case was governed by the Tucker Act, 28 U. S. C. § 41 (20), which provides for trial without jury. The court held that in those circumstances there was no consent to waive a jury trial. Here the petitioner could not have made such a mistake, not only because of the well-settled nature of the law on the subject, particularly in the Second Circuit, but also because the petitioner itself asserted the lack of admiralty jurisdiction (R. 8, 171; Pet. 8, 11).

also for the operating expenses of respondent's cable ship while engaged in the repair work. The court below properly disposed of the contention, observing that "if the government had not maintained such a vessel it would have had to employ an outside contractor to make the repairs. We can see no reason why the [petitioner], who caused the damage to the government's cable, should not pay the expense of the repairs while they were being made" (R. 170–171). See *The Favorita,* 18 Wall. 598; *The Cayuga,* 7 Blatchf. 385, affirmed, 14 Wall. 270; *The A. A. Raven,* 231 Fed. 380 (C. C. A. 3); *The Commonwealth,* 297 Fed. 651 (S. D. N. Y.); *The Mayor,* 36 Fed. 716 (S. D. N. Y.).

Petitioner also argues that in finding the master of the tug guilty of negligence the district court and the court below have held petitioner liable in tort for the unforeseeable consequences of its servant's act (Pet. 10, 17, 18). The undisputed facts adequately answer this contention.[3]

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[3] The tug was passing through a cable area, appropriately marked on Coast and Geodetic Survey charts (R. 4, 8, 12, 17); the 800-foot long steel hawser (R. 12, 17, 50, 61–62, 129), one and three-quarters-inches thick (R. 49), by which the tug was towing a scow, slackened so as to fall beneath the surface of the water (R. 9, 37, 50) and became firmly entangled in an obstruction (R. 9, 51, 60, 129). In these circumstances, the master of the tug could reasonably foresee that if he tried to pull the hawser loose by main force, by attempting to reel it in on a steam reel (R. 51) and by running his engines forward for 15 minutes (R. 51, 60–61, 129), he would damage the cables known to be lying at the bottom of the area. These facts, amply supported by the evidence, were found by the district court and affirmed by the Circuit Court of Appeals.

CONCLUSION

The decision below is clearly correct and there is no conflict of authorities. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General,
FRANCIS M. SHEA,
Assistant Attorney General,
DAVID L. KREEGER,
Special Assistant to the Attorney General,
ABRAHAM J. HARRIS,
Attorney.

NOVEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944